

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

GLENN B. ZAJAC,

Plaintiff,

vs.

Case No. 2005-2639-NF

AUTO CLUB INSURANCE ASSOCIATION,
a Michigan corporation,

Defendant.

OPINION AND ORDER

Defendant has filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Plaintiff, in turn, requests summary disposition pursuant to MCR 2.116(I)(2).

Plaintiff filed this complaint on June 30, 2005. Plaintiff claims that he was injured in a motor vehicle accident on February 17, 2003. At the time of the accident, plaintiff carried a no-fault insurance policy with defendant Auto Club Insurance Association. As a result of the injuries which plaintiff allegedly sustained during the accident, plaintiff claims that he is unable to return to work as a residential homebuilder. Plaintiff commenced this litigation seeking, inter alia, wage loss benefits in the form of lost profits from his nascent home construction business.

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtko v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no



factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In evaluating a motion brought under this subrule, the Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Spencer v Citizens Ins Co*, 239 Mich App 291, 299; 608 NW2d 113 (2000). When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Pursuant to MCR 2.116(D)(2), the trial court may grant summary disposition to the nonmoving party if it is entitled to judgment as a matter of law. *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

In support of its motion for summary disposition, defendant notes that plaintiff's business venture was operating for approximately one year prior to plaintiff's injury, but never realized any profits. Defendant also notes that plaintiff was in the preliminary stages of home construction, and had not even finished clearing the lot on which he planned to erect his first house at the time of his injury. Moreover, defendant claims that plaintiff failed to file income tax returns for his business enterprise. Therefore, defendant argues that there is inadequate documentation supporting plaintiff's claim for future lost profits, and asserts that plaintiff's claim is based solely on speculation and conjecture.

A plaintiff must establish proof of lost profits with a reasonable degree of certainty. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997) (citations omitted). While lost profits cannot be based on mere conjecture or speculation, "the law does

not require impossibilities and does not require a higher degree of certainty than the nature of the case permits." *Poirier v. Grand Blanc Twp*, 192 Mich App 539, 549; 481 NW2d 762 (1992) (citation omitted). A new business may recover lost profits as long as the profits can be established with a reasonable degree of certainty. See *Fera v Village Plaza, Inc*, 396 Mich 639, 643-645; 242 NW2d 372 (1976). In the context of no-fault benefits, "an injured person is entitled to the loss of income from the work he *would have performed* had he not been injured." *Kirksey v Manitoba Public Ins Corp*, 191 Mich App 12, 16; 477 NW2d 442 (1991) (emphasis added); citing MCL 500.3107(b).

Turning to the case at bar, the Court disagrees with defendant's contention that plaintiff has failed to state a claim. Since new business entities without a history of profits are not necessarily barred from maintaining an action for lost profits, plaintiff's claim is not clearly unenforceable as a matter of law. Accepting all of plaintiff's factual allegations concerning his anticipated profits as true, it is clear that plaintiff has stated a claim upon which relief may be granted. As such, defendant's request for summary disposition under MCR 2.116(C)(8) must be denied.

The Court shall now address plaintiff's request for summary disposition pursuant to MCR 2.116(C)(10). The Court has carefully reviewed the documentary evidence presented, and the Court is satisfied that there is a genuine issue of material fact as to the existence and extent of plaintiff's alleged lost profits.

First, plaintiff has outlined his experience in home construction in his deposition testimony. Plaintiff alleges that he built his own personal residence with limited assistance. Plaintiff's Exhibit D, Deposition of Glenn Zajac at 10-12. Plaintiff also avers that he built several garages for friends, helped another friend build a house, and completed an addition and

installed an in-ground pool at his own home. *Id.* at 10-11. This testimony suggests that plaintiff was capable of effectuating his plan to construct houses substantially on his own.

Second, plaintiff has provided the Court with an affidavit from Ronald K. Tyson, a licensed builder, estimating the cost of building the first house, which plaintiff intended to build in 2003, at \$103,424.00.¹ Plaintiff's Exhibit H, Affidavit of Ronald K. Tyson at 2. Tyson estimates the costs of building similar houses in 2004 and 2005, at \$104,975.00 and \$106,549.00, respectively. *Id.* at 3. Tyson also estimates that plaintiff would have completed construction of the first house in November, 2003, had he not been injured. *Id.* Tyson opines that plaintiff's goal of building two additional homes in 2004 and three additional homes in 2005 was realistic, and avers that plaintiff would have easily achieved this goal, but for his injuries. *Id.*

Next, plaintiff has provided the Court with the affidavit of Edward J. Nader, Jr., a licensed real estate appraiser, claiming that the first home plaintiff constructed would have had a sales comparison value of \$158,000.00 and a cost value of \$150,000.00 in 2003. Plaintiff's Exhibit I, Affidavit of Edward J. Nader, Jr. at 2. Nader estimates that a similar home built in 2004 would have had a sales comparison value of \$168,000.00 and a cost value of \$164,400.00, while Nader estimates that a similar home in 2005 would have had a sales comparison value of \$160,000.00 and a cost value of \$159,600.00. *Id.* at 2-3.

Based upon the affidavits, deposition testimony and other documentary evidence presented by plaintiff, the Court cannot say that plaintiff's damages are based on mere speculation or conjecture. Defendant's allegation that plaintiff had not yet recognized a profit in his undertaking is not dispositive of plaintiff's claims. Rather, plaintiff is entitled to his lost

¹ Plaintiff has also provided additional documentary evidence of the costs associated with constructing the home by furnishing the Court with estimates from various building suppliers. See Plaintiff's Exhibit F.

income from work "he *would have performed* had he not been injured." *Kirksey, supra* (emphasis added). In short, plaintiff has raised a genuine issue of material fact concerning his business's profitability had he not been injured. As such, defendant is not entitled to summary disposition pursuant to MCR 2.116(C)(10).

Likewise, the Court finds that plaintiff's request for summary disposition must be denied. While the documentary evidence proffered by plaintiff raises an issue of fact as to plaintiff's lost profits, the Court is not convinced that plaintiff's lost profits have been established with a degree of certainty justifying his recovery as a matter of law. Therefore, summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2) is not warranted.

For the reasons set forth above, defendant's motion for summary disposition is DENIED. Plaintiff's request for summary disposition is also DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order does not resolve the last pending claim or close this case.

IT IS SO ORDERED.



JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: May 10, 2006

cc: Ronald L. Broquet, Attorney at Law

Pasquale Galba, Jr., Attorney at Law